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CIVIL SERVICE APPOINTMENTS AND PROMOTIONS

N.Y. CONST. art. V, § 6:

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

Mancuso v. Levitt¹⁵⁹
(decided February 17, 1994)

Plaintiffs challenged the constitutionality of two statutes governing protests of civil service examinations.¹⁶⁰ The appellate division held that the plaintiffs failed to prove that section 50-a¹⁶¹

159. ___ A.D.2d ___, 607 N.Y.S.2d 353 (1st Dep't 1994).

160. *Id.* at ___, 607 N.Y.S.2d at 353.

161. N.Y. CIV. SERV. LAW § 50-a (McKinney 1993). Section 50-a provides in pertinent part:

Any person who has taken a civil service examination for a position in the competitive class within the jurisdiction of the department of personnel of the city of New York shall have the opportunity to protest any answer or rating guide proposed by the department of personnel to any question on such examination in accordance with the provisions of this section. Such protest must be filed with the city personnel director within the time limits established pursuant to this section, and in the manner set forth in this section. Within a reasonable time after the last date that protests are permitted to be filed pursuant to this section, the city personnel director shall submit all protests filed in connection with an examination to a test validation board which shall consist of one member appointed by the city personnel director, one member appointed by the city personnel director from a list of up to three incumbent employees nominated by the certified employee organization representing employees in the title of the examination in question or if no certified employee organization exists, then nominated by an

employee organization recognized by the city personnel director as representing such employees, and one member appointed jointly by the other two members. If there is more than one certified employee organization or more than one recognized employee association, such organizations or associations shall submit jointly a list of three nominees. Within a reasonable period after the date a civil service examination for a position in the competitive class within the jurisdiction of the department of personnel of the city of New York is administered, the department shall make available to candidates the examination questions and proposed key answers or rating guide, as appropriate, prepared by the city personnel director or his or her designee. The candidate's answer sheet shall be made available to them at the beginning of the protest period. Within thirty days from the date that such proposed key answers and/or rating guides are made available to candidates, any candidate wishing to file a protest to one or more key answers or to the rating guide shall submit a completed written protest, together with evidence in support thereof, to the city personnel director. Such protest shall be duly subscribed by the protesting candidate, shall state the date and number of the examination, and the candidate's social security number and the original and four copies shall be submitted. Protests to proposed key answers or rating guides shall include a statement explaining why the answer selected by the protesting candidate is as good as or better than the proposed key answer or why the rating guide is in error, and any additional evidence the candidate wishes to submit support of such statement. Within a reasonable time after the last date for filing protests, the test validation board shall make a determination whether the answers selected by the protesting candidates are as good as or better than the proposed key answers or whether the rating guide should be modified and shall give reasons therefor in an opinion in writing. Such determination shall be binding on the city personnel director and shall be made available for review at the department of personnel. Within ten day after the determination is issued, a notice of its availability shall be served upon the protesting candidates by mail. A candidate aggrieved by the determination of the test validation board may file a petition in supreme court pursuant to article seventy-eight of the civil practice law and rules in accordance with subdivision seven of section fifty of this chapter. Such petition must be filed within thirty days after service of the notice of availability of the determination of the test validation board upon the protesting candidate in accordance with the provision of this section. The city civil service commission shall have no jurisdiction to make determinations with respect to protests to answers or rating guides to civil service examination questions.

Id.

and section 50(7)¹⁶² of the Civil Service Law violated the State Constitution¹⁶³ and that the test espoused in *Acosta v. Lang*¹⁶⁴ was superseded by the aforementioned statutory provisions.¹⁶⁵

In December 1986, the plaintiffs took Examination No. 5608, a civil service promotional exam.¹⁶⁶ Subsequently, the plaintiffs brought an action to challenge the grading of the exam.¹⁶⁷ The lower court held that section 50-a was unconstitutional on its face and section 50(7) of the Civil Service Law was unconstitutional as applied.¹⁶⁸ Additionally, the court remanded the matter to a referee.¹⁶⁹

The appellate division vacated the lower court's decision and held that the plaintiffs failed to prove that section 50-a and

162. N.Y. CIV. SERV. LAW § 50(7) (McKinney 1993). Section 50(7) provides:

Court review of examination questions and answers. Where the state civil service commission or appropriate municipal civil service commission has, following its duly established review procedures, which in the case of the city of New York are set forth in section fifty-a of this chapter, made a final determination as to the answers that are acceptable on a particular examination, such determination shall not be subject to further review in any court. Court review shall be limited to be a determination of whether such duly established review procedures were followed, and the court shall have no authority to determine whether the commission's determination was correct.

Id.

163. N.Y. CONST. art. V, § 6. The section provides that civil service appointment and promotion be based upon "merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive." *Id.*

164. 13 N.Y.2d 1079, 196 N.E.2d 60, 246 N.Y.S.2d 404 (1963) (setting forth a method for reviewing examination questions and answers).

165. *Mancuso*, ___ A.D.2d at ___, 607 N.Y.S.2d at 353.

166. *Id.* at ___, 607 N.Y.S.2d at 353.

167. *Id.* at ___, 607 N.Y.S.2d at 353. On March 18, 1993, the county court denied the defendants' motion to dismiss and granted the plaintiffs' cross-motion for leave to renew and reargue their summary judgment motion. *Id.* at ___, 607 N.Y.S.2d at 353. On August 6, 1993, the court granted the plaintiff's motion to resettle. *Id.* at ___, 607 N.Y.S.2d at 353.

168. *Id.* at ___, 607 N.Y.S.2d at 354.

169. *Id.* at ___, 607 N.Y.S.2d at 354.

section 50(7) of the Civil Service Law violated the State or Federal Constitution.¹⁷⁰ The appellate division found that the plaintiffs failed to rebut the “strong presumption”¹⁷¹ that sections 50-a and 50(7) of the Civil Service Law are constitutional.¹⁷² The court also found the lower court’s decision, to refer the case to a referee, to be improper.¹⁷³ In addition, the court denied the plaintiff’s request to create a special eligibility list and to provide an *Acosta* hearing.

The appellate court found that the formula set forth in *Acosta* was inapplicable.¹⁷⁴ In *Acosta*, the court of appeals set forth a procedure for challenging examination answers.¹⁷⁵ First, the petitioner must demonstrate ‘that the answer given by the candidate on the test is better or at least as good as the key answer.’¹⁷⁶ Then if there are two equally acceptable answers, a hearing must be provided.¹⁷⁷

At the time *Acosta* was decided, a statutory procedure for reviewing the grading of civil service exams did not exist.¹⁷⁸ The *Mancuso* court held that the legislature expressly replaced the *Acosta* formula by enacting Civil Service Law 50-a and 50(7) to relieve the courts from the burden of evaluating answers.¹⁷⁹

170. *Id.* at ___, 607 N.Y.S.2d at 354.

171. *Id.* at ___, 607 N.Y.S.2d at 354 (citing *Brown-Forman Distillers Corp. v. State Liquor Auth.*, 64 N.Y.2d 479, 485-86, 479 N.E.2d 764, 767 490 N.Y.S.2d 128, 131 (1985), *rev’d*, 476 U.S. 573 (1986)).

172. *Id.* at ___, 607 N.Y.S.2d at 354.

173. *Id.* at ___, 607 N.Y.S.2d at 353. Plaintiffs were found to have no available remedy since their article 78 proceeding was untimely. *Id.* at ___, 607 N.Y.S.2d at 353.

174. *Id.* at ___, 607 N.Y.S.2d at 353.

175. *Acosta*, 13 N.Y.2d at 1081, 196 N.E.2d at 61, 246 N.Y.S.2d at 405.

176. *Id.*

177. *Id.*

178. *Id.* at ___, 607 N.Y.S.2d at 354.

179. *Mancuso*, ___ A.D.2d at ___, 607 N.Y.S.2d at 354. Furthermore, the *Mancuso* court reaffirmed the court of appeals holding in *New York City Dep’t of Envtl. Protection v. New York City Civil Serv. Comm’n*, 78 N.Y.2d 318, 321, 579 N.E.2d 1385, 1386, 574 N.Y.S.2d 664, 665 (1991), that when the legislature has replaced judicial review with evaluation by an administrative agency, such agency’s decision is final and not reviewable. *Mancuso*, ___ A.D.2d at ___, 607 N.Y.S.2d at 354.

Additionally, the court stated that the statutory evaluation procedure will be upheld as long as it complies with the State Constitution's "merit and fitness requirement."¹⁸⁰

FOURTH DEPARTMENT

Wood v. Irving¹⁸¹
(decided December 29, 1993)

The petitioner, a state employee, claimed that Civil Service Law section 58(4)(c),¹⁸² did not violate the state constitutional requirement that civil service appointments be by competitive examination.¹⁸³ Consequently, the petitioner brought an article 78¹⁸⁴ proceeding against the Police Department of the City of Rochester seeking an appointment as detective and commensurate compensation.¹⁸⁵ The Appellate Division, Fourth Department,

180. *Id.* at A.D.2d at ___, 607 N.Y.S.2d at 354.

181. ___ A.D.2d ___, 605 N.Y.S.2d 799 (4th Dep't 1993).

182. N.Y. CIV. SERV. LAW § 58(4)(c) (McKinney 1992). The statute provides in pertinent part that:

[a]ny person who has received permanent appointment as a police officer and is temporarily assigned to perform the duties of a detective shall, whenever such assignment exceeds eighteen months in duration, be appointed as a detective and receive the compensation ordinarily paid to a detective performing such duties.

Id.

183. N.Y. CONST. art. V, § 6. Section 6 provides in part:

Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive

Id.

184. N.Y. CIV. PRAC. L. & R. §§ 7801-7806 (McKinney 1981 & Supp. 1992). Article 78 of the C.P.L.R. is the "major vehicle for judicial review of the actions (or inactions) of, and decisions by, government officials and bodies" 8 JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE 7801.02 (1992).

185. *Wood*, ___ A.D.2d at ___, 605 N.Y.S.2d at 799-800.